

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-218241

DATE: June 18, 1985

MATTER OF: Pitney Bowes, Inc.

DIGEST:

1. GAO will not consider a protest where the issues presented are before a court of competent jurisdiction and the court has not expressed any interest in a GAO decision, or where the issues have already been decided by the court.
2. GAO will not award attorneys fees or other costs of pursuing a protest where GAO has made no determination on the merits of the protest because the matter was decided by a court by competent jurisdiction.

Pitney Bowes, Inc. protests an award of contract by the U.S. Army Defense Supply Service-Washington ("Army") to Whitaker Brothers ("Whitaker") under solicitation No. MDA903-85-B-0014. The solicitation is for ten high-volume mailing systems, including mailing machines, electronic scales, a postal-meter tape-dispensing mechanism, and an accumulator to tabulate mailings and postage costs. Pitney Bowes contends that the awardee's bid was nonresponsive because it offered equipment which was reconditioned rather than new, and the Invitation for Bids made no provision for acceptance of such equipment.

We dismiss the protest.

Pitney Bowes filed its protest with our Office on February 26, 1985. Under Section 2741 of the Competition in Contracting Act of 1984 ("CICA"), P.L. 98-369, and section 21.4 of our Bid Protest Regulations implementing CICA, 4 C.F.R. 21.0 et seq. (1985) ("Regulations"), the Army was required immediately upon receipt of the protest to direct the awardee, Whitaker, to cease performance under the contract and to suspend any related activities that might result in additional obligations being incurred by the United States under that contract as long as the protest was pending. The Army refused to suspend contract performance, however, and Pitney Bowes filed suit in the United States District Court for the District of Columbia

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on March 13, seeking to enjoin the agency from proceeding with the contract. Pitney Bowes also sought from the court declaratory relief on the merits of its protest, bid preparation costs plus costs and attorneys fees.

Pitney Bowes v. United States, Civ. Action No. 85-0832.

The District Court issued a Temporary Restraining Order, enjoining the Army from proceeding with performance of the Whitaker contract. On April 1, 1985, the District Court granted Pitney Bowes' motion for Summary Judgment, holding that the Army's award to Whitaker Brothers violated Federal Acquisition Regulation, section 10.010 and finding the contract therefore void. Although the court enjoined performance of the Whitaker contract, it did not order that the contract be awarded to Pitney Bowes, the next low bidder, nor did it award costs or fees. The Army has indicated to the protester that it has not yet made a decision on whether such award will be made.

Pitney Bowes has requested a determination of its protest, notwithstanding the District Court's decision. The protester does not seek to disturb the decision of the District Court on the merits of its case, but wishes to apply to our Office for costs of filing and pursuing its protest, to which it believes it is entitled under CICA and § 21.6(d) of our regulations.

Our Bid Protest Regulations require the dismissal of any protest where the matter involved is the subject of litigation before a court of competent jurisdiction, (unless the court requests a decision by the General Accounting Office) or where the matter involved has been decided by the court, 4 C.F.R. § 21.9, and it has long been the policy of our Office not to decide protests that come within these guidelines in the present regulation. Santa Fe Corp., B-218234.2, Mar. 27, 1985, 64 Comp. Gen. ___, 85-1 CPD ¶ 361; see Raycomm Industries, Inc., B-182170, Feb. 3, 1975, 75-1 CPD ¶ 72.

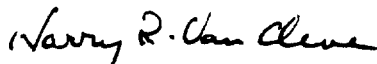
The issues presented in Pitney Bowes' court proceeding are identical to the issues presented in this protest, with the exception of the protester's claim for costs and attorneys' fees. Therefore, the court's determination of the lawsuit controls the resolution of the bid protest issues. Under the doctrine of res judicata, the court's determination of these issues is final and binding on the protester and the Army. Therefore, it would be pointless for us now to consider the merits of Pitney Bowes' complaint.

Pitney Bowes argues that it is nevertheless entitled to a determination of its claim for costs, since this issue was not addressed by the court. Pitney Bowes asserts that it did not voluntarily elect to pursue a remedy in court, but was forced to resort to litigation when the Army refused to suspend performance of the contract while the protest filed with our Office was pending. After the court granted a temporary restraining order, both parties filed motions for summary judgment; Pitney Bowes expressed in its motion its willingness for the court to seek an advisory opinion from this Office. The protester argues, therefore, that it was at all times willing to have the matter resolved by this Office. Furthermore, Pitney Bowes objects that the Army's refusal to comply with the stay provisions of CICA necessitated the court action and should not now have the less direct result of denying Pitney Bowes any forum in which to pursue the remedies made available by statute.

We recognize the difficulty of the situation created by the agency's refusal to adhere to the provisions of CICA. However, the fact remains that Pitney Bowes actively sought relief from the court. Thus, the protester accepted the possibility that the court would decide the case without requesting our opinion and indeed invited the court to do so. Where a protester seeks and obtains substantive relief from a court with no decision by this Office, it is not entitled to the award of attorneys fees by the Comptroller General.

The responsibility of this Office under CICA is to decide if a protested procurement action violates a statute or regulation. Such a decision on the merits of a protest is an essential condition to a declaration that the protester is entitled to the award of reasonable costs of filing and pursuing the protest, including attorneys fees. 4 C.F.R. 21.6(d). Thus, the authority to declare entitlement to these costs is ancillary to our decision regarding compliance with the procurement statutes and regulations. The legality of the Army's action in this case has been finally determined by a United States District Court, and our regulations therefore require dismissal of the protest.

The protest is dismissed.


Harry R. Van Cleve
General Counsel